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AmFraser Securities Pte Ltd v Poh Gaik Lye

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 03(i)-3–08 OF 2013(B)
RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), AHMAD MAAROP AND ZAINUN ALI FCJJ
20 APRIL 2016

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Bankruptcy — Notice — Setting aside — Judgment debtor issued bankruptcy notice ten years and five months after summary judgment obtained — Allegation that sum excessive — Application by judgment creditor to set aside bankruptcy notice — Whether bankruptcy notice stood valid when judgment debtor failed to dispute claim within seven days from date of service of bankruptcy notice — Bankruptcy Act 1967 s 3(2)(ii)

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The appellant had obtained a summary judgment against the respondent in the sum of RM11,482,024.19 with interest at 13%. Ten years and five months after the judgment was obtained, the appellant issued a bankruptcy notice ('BN'). The respondent filed an application in the High Court for the order, inter alia, that the BN filed by the judgment creditor ('1998 Order') be set aside. One of the grounds given by the respondent for setting aside the BN was that leave for issuance of the BN had not been obtained by the appellant. The respondent's application to set aside the BN was allowed by the senior assistant registrar but the High Court judge allowed the appellant's appeal. The BN was thus reinstated. The Court of Appeal allowed the respondent's appeal, set aside the decision of High Court judge and reinstated the decision of the senior assistant registrar. In other words, the bankruptcy notice was set aside. The appellant's application to appeal to this court was allowed on the following questions of law, inter alia, whether the BN stood valid under the provisions of s 3(2)(ii) of the Bankruptcy Act 1967 ('the Act') when the judgment debtor failed to dispute the claim stated in the BN as being excessive within seven days from the date of service of the BN.

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Held, dismissing the appeal:

(1) The extension order contained the name of 'Citibank Berhad' instead of the appellant's name. In its application to set aside the BN, the respondent also applied to set aside the substituted service. The appellant sought to remedy the defect an application to amend the extension order which was allowed by the High Court. The reason given in support of the application was clerical mistake and/or accidental slip. The Court of Appeal found that the application for amendment was made some three

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months after the respondent made her application to set aside the BN. The extension order containing the name 'Citibank Berhad' could not provide a valid extension because 'Citibank Berhad' had no locus standi to make that application for the extension of the BN and substituted service (see para 10).

(2) The service of the BN by the publication of the substituted service order was not a valid service because the substituted service order (which was embodied in the extension order) suffered from the same defect aforesaid. The amendment order could not revive something which never had a life in the first place. The mode of application for amendment of the BN and substituted service of the same (by an ex parte application) was another disturbing feature which weighed in favour of the respondent. Since at the time the appellant made the application to amend, the respondent had already made her application to set aside the BN. There was no reason why the respondent or her solicitors could not be informed of the application. As such, the principle of natural justice must be applied with full force in the circumstances (see para 10).

(3) In the letter of appointment for service, it was stated that on two occasions of attempted service, the appellant's representative was told that the respondent was not present at the premises. Whilst in the affidavit of the process server it was stated that the premises were closed and the process server's calls were not answered. The inconsistency could not be brushed aside as petty because when any application was made to the court especially on an ex parte basis, an applicant must make full, frank and accurate disclosure to the court (see para 10).

(4) It could not be disputed that the BN was issued more than six years after the judgment was obtained. In fact it was issued some ten years and five months after the judgment was given. More importantly, it could not be disputed that no prior leave of the court to issue writ of execution to enforce a judgment pursuant to O 46 r 2(1)(a) of the Rules of High Court 1980 ('the RHC') was obtained. This point was specifically raised by the respondent as one of her grounds in applying to set aside the BN (see para 11).

(5) The appellant was not a person who for the time being entitled to enforce a final judgment in the proviso to s 3(1)(i) of the Act. In such a case, leave under O 46 r 2 of the RHC should have been obtained by it. Since no leave as such was obtained by the appellant, it was then not in a position to execute the judgment. Thus, it was not entitled to issue the BN. On this ground alone, the BN must be set aside (see para 15).

[Bahasa Malaysia summary

Perayu telah memperoleh penghakiman terus terhadap responden untuk sejumlah RM11,482,024.19 dengan faedah pada kadar 13%. Sepuluh tahun

dan lima bulan selepas penghakiman itu diperolehi, perayu telah mengeluarkan notis kebankrapan ('NK'). Responden telah memfailkan permohonan di Mahkamah Tinggi untuk perintah, antara lain, bahawa NK yang difailkan oleh pemiutang penghakiman ('Perintah 1998') diketepikan. Salah satu alasan yang diberikan oleh responden untuk mengetepikan NK adalah bahawa kebenaran untuk keluaran NK tidak diperoleh oleh perayu. Permohonan responden untuk mengetepikan NK dibenarkan oleh penolong kanan pendaftar tetapi hakim Mahkamah Tinggi telah membenarkan rayuan perayu. NK dengan itu telah dikembalikan kepada keadaan asal. Mahkamah Ryuan telah membenarkan rayuan responden, mengetepikan keputusan hakim Mahkamah Tinggi dan mengembalikan kepada asal keputusan penolong kanan pendaftar. Dalam erti kata lain, notis kebankrapan itu diketepikan. Permohonan perayu untuk merayu kepada mahkamah ini dibenarkan atas persoalan undang-undang berikut, antara lain, sama ada NK adalah sah di bawah peruntukan s 3(2)(ii) Akta Kebankrapan 1967 ('Akta') apabila penghutang penghakiman gagal untuk mempertikaikan tuntutan yang dinyatakan dalam NK itu sebagai melampau dalam tujuh hari selepas tarikh penyampaian NK itu.

Diputuskan, menolak rayuan:

(1) Perintah lanjutan mengandungi nama 'Citibank Berhad' dan bukan nama perayu. Dalam permohonannya untuk mengetapikan NK itu, responden juga telah memohon untuk mengetepikan penyampaian gantian. Perayu memohon untuk meremedikan kecacatan permohonan untuk meminda perintah lanjutan yang dibenarkan oleh Mahkamah Tinggi. Sebab yang diberikan untuk menyokong permohonan itu adalah kesilapan perkeranian dan/atau kecuaian yang tidak disengajakan. Mahkamah Rayuan mendapati bahawa permohnan untuk pindaan itu dibuat tiga bulan selepas responden membuat permohonannya untuk mengetepikan NK itu. Perintah lanjutan yang mengandungi nama 'Citibank Berhad' tidak boleh memberikan lanjutan sah kerana 'Citibank Berhad' tidak mempunyai locus standi untuk membuat permohonan itu untuk lanjutan NK dan penyampaian gantian itu (lihat perenggan 10).

(2) Penyampaian NK oleh penerbitan perintah penyampaian gantian bukan penyampaian sah kerana perintah penyampaian gantian (yang terkandung dalam perintah lanjutan) mengalami kecacatan yang sama. Perintah pindaan tidak boleh mengembalikan apa yang tidak wujud pada mulanya. Cara permohonan untuk pindaan NK itu dan penyampaian gantian yang sama (melalui permohonan ex parte) merupakan satu lagi sifat yang tidak baik yang lebih menyebelahi responden. Pada masa perayu membuat permohonan untuk meminda, responden telahpun membuat permohonannya untuk mengetepikan NK itu. Tiada sebab kenapa responden atau peguamcaranya tidak diberitahu tentang

permohonan itu. Oleh itu, prinsip keadilan asasi perlu terpakai sepenuhnya dalam keadaan berikut (lihat perenggan 10).

(3) Dalam surat pelantikan untuk penyampaian, ia dinyatakan bahawa pada dua kejadian cubaan penyampaian, wakil perayu diberitahu yang responden tidak hadir di premis. Walhal dalam afidavit penyampai proses menyatakan bahawa premis itu tutup dan panggilan penyampai proses tidak dijawab. Keadaan tidak konsisten ini tidak patut dianggap remeh kerana apabila apa-apa permohonan dibuat kepada mahkamah terutamanya atas dasar ex parte, pemohon perlu membuat penzahiran tepat, benar dan penuh kepada mahkamah (lihat perenggan 10).

(4) Ia tidak boleh dipertikaikan bahawa NK itu dikeluarkan lebih enam tahun selepas penghakiman itu diperoleh. Bahkan ia dikeluarkan sepuluh tahun dan lima bulan selepas penghakiman diberikan. Lebih penting lagi, ia tidak boleh dipertikaikan bahawa tiada kebenaran terdahulu daripada mahkamah untuk mengeluarkan writ pelaksanaan bagi menguatkuasakan penghakiman menurut A 46 k 2(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang telah diperoleh. Perkara ini khususnya ditimbulkan oleh responden sebagai salah satu alasannya dalam memohon untuk mengetepikan NK itu (lihat perenggan 11).

(5) Perayu bukan orang yang pada masa itu berhak menguatkuasakan penghakiman muktamad dalam proviso s 3(1)(i) Akta. Dalam kes sedemikian, kebenaran di bawah A 46 k 2 KMT sepatutnya diperolehi olehnya. Oleh kerana tiada kebenaran sedemikian telah diperolehi oleh perayu, maka ia bukan dalam kedudukan untuk melaksanakan penghakiman itu. Oleh itu, ia tidak berhak untuk mengeluarkan NK itu. Atas alasan ini sahaja, NK itu hendaklah diketepikan (lihat perenggan 15).]

Notes

For cases on setting aside, see 1(3) *Mallal's Digest* (5th Ed, 2015) paras 3500–3551.

Cases referred to

AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal [2013] 3 MLJ 179; [2013] 3 CLJ 317, FC (refd)

Aris Massod ex p UOL Factoring Sdn Bhd, Re [1998] 4 CLJ Supp 446, HC (refd)

Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal [2015] 4 MLJ 1, FC (folld)

Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Courts of Judicature Act 1964 s 78(1)
Rules of the High Court 1980 O 46 rr 2, 2(1)(a)

Appeal from: Civil Appeal No B-03(IM)-127–08 of 2012 (Court of Appeal, Putrajaya)

Foo Joon Liang (Tan Min with him) (Shearn Delamore & Co) for the appellant.
Yeoh Cho Kheong (Ho Kok Yew with him) (Ranjit Singh & Yeoh) for the respondent.

Ahmad Maarop FCJ:

[1] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Apandi Ali FCJ has since resigned, upon his appointment as the Attoney General of Malaysia.

[2] In this appeal the appellant is the judgment creditor and the respondent is the judgment debtor. This judgment concerns the appeal by the appellant against the decision of the Court of Appeal which overturned the decision of the High Court made on 15 June 2011. In its decision, the High Court reversed the decision of the senior assistant registrar who had set aside the bankruptcy notice upon the application made by the respondent.

[3] The background facts leading to the present appeal are these. On 10 July 1998, the appellant obtained a summary judgment against the respondent in the sum of RM11,482,024.19 with interest at 13% from 17 December 1997 until date of settlement. Based on that judgment, on 18 December 2008 — (ten years and five months after the judgment was obtained), the appellant issued a bankruptcy notice. The particulars of the sum claimed in the bankrucptcy notice are as follows:

Judgment sum	RM11,482,024.19
Interest on the sum of RM11,482,024.19 at the rate of 13%pa from 17 December 1997–9 July 2004 (2397 days)	RM9,802,502.93
Costs	RM –
Amount outstanding as at 9 July 2004	RM21,284,527.12

[4] On 21 April 2009, pursuant to its ex parte application the appellant obtained an order to extend the validity of the bankruptcy notice (from

18 March 2009–17 March 2010) ('extension order'). In the extension order an order of substituted service of the bankruptcy notice was also granted.

[5] On 16 December 2009, the respondent filed an application in the High Court for the following orders:

(a) *that the bankruptcy notice dated 18 December 2008 filed by the judgment creditor* ('bankruptcy arising from an order dated 10 July 1998 obtained by the judgment creditor vide Shah Alam High Court Civil Suit No MT1–22–673 of 1997 ('1998 Order') *be set aside*;

(b) that the order dated 21 April 2009 allowing extension of the bankruptcy notice for a period of twelve months from 18 March 2009–17 March 2010 and the substituted service of the said bankruptcy notice on the judgment debtor ('order for extension and SS') be set aside; and

(c) that this proceeding be stayed pending the hearing of this application.

[6] In the application, one of the grounds given by the respondent for setting aside the bankruptcy notice was that leave for issuance of the bankruptcy notice had not been obtained by the appellant.

[7] The respondent's application to set aside the bankruptcy notice was allowed by the senior assistant registrar. On 25 July 2012, the learned judge of the High Court allowed the appellant's appeal. The bankruptcy notice was thus reinstated.

[8] On 30 January 2013, the Court of Appeal allowed the respondent's appeal, set aside the decision of the learned judge of the High Court and reinstated the decision of the senior assistant registrar. In other words, the bankruptcy notice was set aside.

[9] The appellant's application to appeal to this court was allowed on the following questions of law:

(a) Whether the Bankruptcy Notice stands valid under the provisions of s. 3(2)(ii) of the Bankruptcy Act 1967 when the Judgment Debtor fails to dispute the claim stated in the Bankruptcy Notice as being excessive within 7 days from the date of service of the Bankruptcy Notice.

(b) Whether the decision of the Federal Court in *United Malayan Banking Corporation Bhd v Ernest Cheong Yong Yin* [2002] CLJ 413, which renders a bankruptcy notice, which has been filed after six years from the date of the Judgment, invalid for claiming arrears in interest, continues to be good law in light of the Federal Court decision in *Perwira Affin Bank Bhd v Lim Ah Hee* [2004] 2 CLJ 787.

(c) Whether a Judgment Creditor is entitled to claim arrears of interest calculated up to six years from the date of Judgment if the bankruptcy proceeding is commenced after 6 years from the date of the Judgment.

DECISION OF THIS COURT

[10] In allowing the respondent's appeal and setting aside the bankruptcy notice, the Court of Appeal gave three reasons. The first relates to a defect in the extension order which the Court of Appeal held to be fatal. It is not disputed that the extension order contained the name of 'Citibank Berhad' instead of the appellant's name. As stated earlier, in its application to set aside the bankruptcy notice dated 16 December 2009, the respondent also applied to set aside the substituted service. The appellant sought to remedy the defect by an application to amend the extension order which was allowed by the High Court on 10 March 2010. The reason given in support of the application was clerical mistake and/or accidental slip. The Court of Appeal found that the application for amendment was made some three months after the respondent made her application to set aside the bankruptcy notice. The Court of Appeal opined that the extension order containing the name 'Citibank Berhad', could not provide a valid extension because 'Citibank Berhad' had no locus standi to make that application for the extension of the bankruptcy notice and substituted service. Further, the Court of Appeal held that the service of the bankruptcy notice by the publication of the substituted service order was not a valid service because the substituted service order (which was embodied in the extension order) suffered from the same defect aforesaid. The Court of Appeal ruled that the amendment order dated 10 March 2010 could not revive something which never had a life in the first place. The Court of Appeal also remarked that the mode of application for amendment of the bankruptcy notice and substituted service of the same (by an ex parte application) was another disturbing feature which weighed in favour of the respondent. Since at the time the appellant made the application to amend, the respondent had already made her application to set aside the bankruptcy notice, there was no reason why the respondent or her solicitors could not be informed of the application. As such the Court of Appeal ruled that 'the principle of natural justice must be applied with full force' in the circumstances. The second ground given by the Court of Appeal relates to inconsistent reasons given by the appellant in support of the application for substituted service. In the letter of appointment for service, it was stated that on two occasions of attempted service, the appellant's representative was told that the respondent was not present at the premises. Whilst in the affidavit of the process server it was stated that the premises were closed and the process server's calls were not answered. The Court of Appeal held that that inconsistency could not be brushed aside as petty because when any application was made to the court especially on an ex parte basis, an applicant must make full, frank and accurate disclosure to the court. In this regard the Court of Appeal referred to Practice Note No 1 which

was referred to in *Re Aris Massod ex p UOL Factoring Sdn Bhd* [1998] 4 CLJ Supp 446. The third reason given by the Court of Appeal was that the bankruptcy notice did not conform to the terms of the sealed order of the judgment. This is what the court said:

> Another reason for our decision is the sealed order which in our view is incomplete and unsatisfactory to say the least. It is trite law that bankruptcy notice must be based on the sealed order of the judgment. In this case, it is undisputed that the sealed order merely states '13% interest' and not '13% interest per annum or month' as is done in all orders. So on the face of that order, the Court cannot say that on what basis was interests charged, is it 13% per month or per annum? One must not forget that the primary document to premise a bankruptcy notice is the judgment and when that is not clear, that bankruptcy notice is to say the least suspect. Hence we have no alternative but to hold that the bankruptcy notice did not conform to the terms of the sealed order of the judgment.

[11] In our view, there is another reason (which is independent of the reasons given by the Court of Appeal in its judgment), which is fundamental in nature on account of which the decision of the High Court reinstating the bankruptcy notice could not stand. It is this. It cannot be disputed that the bankruptcy notice was issued more than six years after the judgment was obtained. In fact it was issued some ten years and five months after the judgment was given on 10 July 1998. More importantly, it cannot be disputed that no prior leave of the court to issue writ of execution to enforce a judgment pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 ('the RHC') was obtained. This point was specifically raised by the respondent as one of her grounds in applying to set aside the bankruptcy notice. In the affidavit filed in support of her application to set aside the bankruptcy notice she deposed as follows:

> I am advise by my solicitors and verily believe that the BN is bad in law as more than 6 years have lapsed since the 1998 order was obtained and leave from the Court has not been obtained to execute that judgment.

[12] The appellant did not deny that no prior leave to execute under O 46 r 2(1)(a) of the RHC was obtained, but contended as follows:

> I verily believe to be true that the said bankruptcy notice is proper and valid in law and leave is not required in the circumstances given that the interest is being claimed only as at 9/7/2004.

[13] The issue of whether leave under O 46 r 2 of the RHC was necessary before the bankruptcy notice could be issued because the period of six years from the date of judgment had lapsed, was considered by the learned judge of the High Court who held that leave was not necessary. The learned judge relied on *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787. This is what the learned judge said in his judgment:

11. Berkaitan dengan isu sama ada keizinan/leave diperlukan sebelum notis kebankrapan dikeluarkan kerana penghakiman telah didapatkan pada tahun 1998 dan tempoh enam tahun telah berlalu. *Keizinan atas leave tidak diperlukan*.

12. Merujuk kepada kes *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787, mahkamah memutuskan antara lain:

> Furthermore, if we bear in mind that the words used in our O 46 r 2 of the RHC 1980 and in the English Rules are 'A writ of execution to enforce a judgment ...' clearly a bankruptcy notice or bankruptcy petition cannot be 'a writ of execution'. So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980.

[14] In her memorandum of appeal to the Court of Appeal, the first ground specified by the respondent in support of her appeal was that the learned judge of the High Court erred in failing to give effect to the fact that the bankruptcy notice was issued without complying with O 46 r 2 of the RHC (see para 2.1 at p 32(b) of the appeal record Vol 2). However, this critical issue was not dealt with by the Court of Appeal. In holding that leave from the court under O 46 r 2 of the RHC was not necessary to issue the bankruptcy notice after the lapse of the six year period from the date of judgment, the High Court had relied upon *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787. *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* [2013] 3 MLJ 179; [2013] 3 CLJ 317, relying upon *Lim Ah Hee*, this court held that the phrase 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to O 46 r 2(1)(a) of the RHC prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago. However, *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal* was reconsidered by a different panel of this court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* [2015] 4 MLJ 1. This later panel declined to follow *AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal*. In *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal*, this court held that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed, must obtain the prior leave of court pursuant to O 46 r 2 of the RHC. The court said:

> With respect, *we could not subscribe to the reasoning in Tan Tem Son. Also, we could not agree that 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago. Rather, we hold that any person who is for the time being entitled to enforce a final judgment in the proviso to s 3(1)(i) of the BA 1967 must be a person*

who is entitled to enforce a final judgment without prior leave of court. In the instant case, judgment was obtained on 10 October 2000. When the BN was issued on 3 January 2011, the judgment was more than six years old. In other words, when the BN was issued, the respondent was not in a position to execute the judgment without the leave of court. Leave should and could have been obtained (see *ex parte Clements* [1901] 1 QB 260, at p 263). In that it was not, such that the respondent was then not in a position to execute the judgment, the respondent was not entitled to issue the BN.

By reason of the aforesaid, our answer to the first leave question is in the positive, *that is to say that a judgment creditor who commences bankruptcy proceedings after more than six years have lapsed from the date of the judgment, must obtain the prior leave of court pursuant to O 46 r 2 of the RHC, now replaced by O 46 r 2 of the Rules of Court 2012*. As our answer to the first leave question will dispose of this appeal, we do not see it necessary to answer the second leave question. (Emphasis added.)

[15] In other words, a person 'who is for the time being entitled to enforce a final judgment' in the proviso to s 3(1)(i) of the Bankruptcy Act 1967 must be a person who is entitled to enforce a final judgment *without* prior leave of court. If when the bankruptcy notice is issued, the judgment was more than six years old, then the judgment creditor *is not* in a position to execute the judgment *without* the prior leave of court. In such a case leave under O 46 r 2 of the RHC must be obtained. Reverting to the relevant facts of the present appeal, the bankruptcy notice was issued some ten years and five months after the judgment was obtained. Applying the law as pronounced by this court in *Dr Shamsul Bahar bin Abdul Kadir v RHB Bank Bhd and another appeal* the answer is clear and the eventual outcome of the appeal is inevitable. The appellant was not a person who for the time being entitled to enforce a final judgment in the proviso to s 3(1)(i) of the Bankruptcy Act 1967. The appellant was not a person who for the time being entitled to enforce a final judgment in the proviso to s 3(1)(i) of the Bankruptcy Act 1967. In such a case leave under O 46 r 2 of the RHC should have been obtained by it. Since no leave as such was obtained by the appellant, it was then not in a position to execute the judgment. Thus, it was not entitled to issue the bankruptcy notice. On this ground alone the bankruptcy notice must be set aside.

[16] What we have decided thus far is sufficient to dispose of the appeal. In the circumstances we find it unnecessary to the answer the questions of law in respect of which the leave to appeal was granted.

[17] In the result, the appeal is dismissed with costs. The decision of the Court of Appeal is affirmed.

Appeal dismissed.

Reported by Afiq Mohamad